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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MAJOR EBERHART, Defendant and Appellant.	A154829 (Contra Costa County Super. Ct. No. 50713693)

On appeal, defendant Major Eberhart argues the trial court erred during sentencing by lifting a previously imposed sentencing stay on one of his counts.[1] We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Only a brief recitation of the facts is necessary as background for the sentencing issue in this appeal.[2]

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[1] In his opening brief, defendant raised a second issue pertaining to calculation of credits. Defendant explained he was contemporaneously asking the trial court to correct the issue and was raising the issue on appeal in case the trial court failed to fix the alleged calculation error. In his reply brief, defendant indicates the issue is moot as the court corrected the issue. We accept this representation, and will not discuss the issue any further. Moreover, in light of this, we deny defendant's motion for judicial notice of the fact that 2008, 2012, and 2016 were leap years, as that fact is not relevant to the remaining issue on appeal.

[2] We grant defendant's unopposed motion for judicial notice of our order directing the trial court to grant defendant's motion to dismiss in case number A152609, as well as the entire record and our unpublished opinion in case number A132736. (Evid. Code, §§ 452, subd. (d) & 459.) As this appeal concerns resentencing after remand, we draw

As relevant here, the evidence at trial showed defendant, the victim, and another person robbed a jewelry store in Daly City on April 21, 2007. The robbers were members of the "KUMI" gang. The victim had gone into the store first, and pulled a gun on the owner while two other men with bandanas over their faces entered the store. After the robbery, defendant called up another KUMI member, Norflis "Pooh" McCullough, and discussed the robbery. Defendant told McCullough that after the robbery, the robbers gathered in a vacant apartment in Richmond to divide the proceeds of the robbery. One of the robbers accused the victim of taking property and withholding it from distribution, and drew his gun on the victim. Defendant drew his own gun on the victim's accuser, asking what was going on and defending the victim. The accuser suggested defendant search the victim, and after stolen items were located in the victim's pockets, the victim told defendant he was "on that stuff" and had to take care of his wife. The victim also told defendant, "I'll make it up to you," to which defendant responded, "Not in this lifetime." Defendant then shot the victim in the head. The victim's body was found on April 22, 2007. Defendant was arrested in Vallejo the following month. When he was arrested, he tried to dispose of a gun by throwing it from an apartment balcony.

In 2011, defendant was convicted of first-degree murder (Pen. Code, § 187,[3] count 1), conspiracy to commit robbery and possession of stolen property (§ 182, subd. (a)(1), count 2), and being a felon in possession of a firearm (former § 12021, subd. (a)(1), count 3).[4] As to count 1, the jury found that defendant personally used a firearm causing death (§ 12022.53, subd. (d)). The jury also found criminal street gang enhancements true (§ 186.22, subd. (b)(1)) as to both counts 1 and 2. The trial court initially imposed an

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our facts from the record and unpublished decision in case number A132736, which decided the appeal from the original judgment. (See *Pacific Gas & Electric Co. v. City and County of San Francisco* (2012) 206 Cal.App.4th 897, 907, fn. 10; *Stephenson v. Drever* (1997) 16 Cal.4th 1167, 1170, fn. 1.)

[3] All further statutory references are to the Penal Code unless otherwise specified.

[4] Count 3 was alleged to have occurred on or about April 21, 2007 through April 22, 2007 in Richmond, in Contra Costa County.

aggregate sentence of 91-years-to-life in state prison for the foregoing counts and enhancements plus prior conviction allegations (§§ 667, subd. (a)(1), 667.5, subd. (b)), including a strike prior (§§ 667, subds. (b)–(i), 1170.12). A two year mid-term was imposed for count 3, but it was stayed pursuant to section 654.

In his first appeal, defendant argued in part that his enhancements for the prior conviction allegations, including the strike prior, were neither admitted nor proved at trial. The People conceded the issue, and we remanded for retrial of those prior conviction allegations and for resentencing. We also corrected an error in the abstract of judgment, striking one of two five-year criminal street gang enhancements. The judgment was otherwise affirmed. Thereafter, because the prior conviction allegations were not tried within the speedy trial time limits set out in section 1382, we issued a peremptory writ of mandate directing the trial court to grant defendant's motion to dismiss the prior conviction allegations.

The trial court then resentenced defendant to 50 years to life for count 1; 10 years for count 2; and eight months (one-third the midterm of two years) consecutive for count 3. The court refused to stay the sentence on count 3 pursuant to section 654 as it had during the original sentencing. In so doing, the court stated: "With regard to Count 3, . . . this I do find separate, and the fact that I might have run it concurrent with the other sentence because you don't want to add too much to already what was a very heavy sentence at that time certainly doesn't bind me in this instance." When defense counsel pointed out that count 3 was not run concurrent, but instead stayed pursuant to section 654, the court said: "And, again, when I look at it now, it's a separate occurrence. It wasn't – the fact that I chose to do that at that time doesn't mean that it's – I don't find it to be 654 to Count 1 or to – in this instance." Defendant appealed.

DISCUSSION

The sole issue in this appeal is whether the trial court erred in not staying the sentence on count 3 pursuant to section 654. Although defendant acknowledges that the court stated the firearm possession underlying count 3 was a "separate occurrence," he argues that the court could not properly lift the stay without expressly finding the stay

was unsupported by the evidence and explaining why the original stay was unauthorized. He also contends the court's decision not to stay count 3 pursuant to section 654 was unsupported by substantial evidence. We disagree.

The law is clear that a trial court's findings on whether section 654 is factually applicable to a series of offenses "may be either express or implied from the court's ruling." (*People v. Tarris* (2009) 180 Cal.App.4th 612, 626 (*Tarris*).) "In the absence of an explicit ruling by the trial court at sentencing, we infer that the court made the finding appropriate to the sentence it imposed, i.e., either applying section 654 or not applying it." (*People v. Mejia* (2017) 9 Cal.App.5th 1036, 1045 (*Mejia*).) Defendant cites no authority indicating courts are required to make explicit rulings and provide an explanation for staying a sentence or not. In any case, at the resentencing hearing here, the court stated it found count 3 was "separate," and it did not find count 3 to "be 654 to Count 1." The court thus explicitly found section 654 did not authorize a stay as to count 3.

The remaining question is whether substantial evidence supported the trial court's finding that section 654 did not authorize a stay as to count 3. (*Mejia*, *supra*, 9 Cal.App.5th at p. 1045.) We turn to that issue now.

Section 654, subdivision (a), provides in pertinent part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." The statute "precludes multiple punishments not only for a single act, but also for an indivisible course of conduct." (*Tarris*, *supra*, 180 Cal.App.4th at p. 626.) " ' "Whether a violation of [former] section 12021 [now section 29800], forbidding persons convicted of felonies from possessing firearms concealable upon the person, constitutes a divisible transaction from the offense in which he employs the weapon depends upon the facts and evidence of each individual case. Thus *where the evidence shows a possession distinctly antecedent and separate from the primary offense, punishment on both crimes has been approved*. On the other hand, where the evidence shows a possession *only* in conjunction with the

primary offense, then punishment for the illegal possession of the firearm has been held to be improper where it is the lesser offense." ' " (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143, italics added (*Jones*).) A trial court has broad latitude in determining whether section 654 applies. (*Ibid*.) We review that decision for substantial evidence, meaning "[w]e review the trial court's determination in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably deduce from the evidence." (*Ibid.*)

Here, there is evidence that defendant possessed a firearm distinctly antecedent to and separate from his act of murdering the victim. McCullough testified that defendant told him that when the robbery participants met in the vacant apartment, one of them accused the victim of keeping some of the stolen goods for himself. The unnamed accuser drew a gun on the victim, and defendant drew his own gun on the accuser. Defendant asked the accuser what was going on, and initially defended the victim, saying the victim "wouldn't do that." It was only after defendant brandished his firearm at the victim's accuser (§ 417, subd. (a)), searched the victim's pockets to see if he was holding out on his cohorts, and heard the victim give his reasons and apologize for his conduct, that defendant turned his firearm on the victim and shot him. This evidence does not demonstrate that mere " 'fortuitous circumstances put the firearm in the defendant's hand only at the instant of committing another offense' "; rather, it is substantial evidence that defendant possessed the firearm before the murder, and with an intent independent from murdering the victim. (*Jones*, *supra*, 103 Cal.App.4th at p. 1144.) Accordingly, we conclude the trial court did not err in refusing to stay count 3 pursuant to section 654.

DISPOSITION

The judgment is affirmed.

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Fujisaki, J.

WE CONCUR:

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Siggins, P.J.

_____
Wick, J.*

A154829

* Judge of the Superior Court of Sonoma County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.